``The sole purpose of the first section of the Fourteenth Amendment was to protect people against unconstitutional State enactment's while also leaving the States their retained rights under their constitutional compact."

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A Dummies Guide to Understanding the Fourteenth Amendment

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Introduction

[Note: I will limit the discussion herein to sections 1 and 5 of the Amendment.]

> Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Does the Fourteenth Amendment make the entire Bill of Rights a restriction against the States? If so, which amendments or clauses? What did both "due process of the law" and "equal protection" mean to the Congress who produced the Amendment? Does the Fourteenth Amendment guarantee State paid education to aliens?

It has long been said that what you don't know can hurt you, and no more is this true than with citizens unknowingly falling victim to faulty Fourteenth Amendment construction. There are jurists who willfully obfuscate the meaning of the Fourteenth Amendment when rendering phony jurisprudence with the goal of advancing their own personal bias. Even scholars are known to obfuscate the Fourteenth Amendment

in hopes their own unsupported constitutional theories may be seen as having some constitutional semblance of validity.

Had the Fourteenth Amendment been seen as remotely empowering Congress to legislate directly over State citizens, would had resulted in certain defeat in the House of Representatives. Its author understood this, and was also convinced that Congress had no proper constitutional jurisdiction to directly legislate over citizens within a State or, should it. Most all involved in the Fourteenth Amendment ratification believed that matters of life, liberty and property of the people belonged exclusively with the States and its citizens, and in no instance should any act be considered to grant Congress such powers.

No Fourteenth Amendment introduction can be complete without first making some basic constitutional concepts clear to the reader. Firstly, consider the Bill of Rights as a combination of State rights and individual guarantee's against certain acts by the federal government. One of the greatest freedoms to come out of the great compact between individual States in forming a new Union we call the United States, was the right to self-government without federal interference during peace. The Bill of Rights acted to protect the States and its citizens from oppressive acts by Congress in abridging such things as speech, the press or imprisonment without trial.

Look at this way: An American citizen has a enumerated right to be protected from acts of Congress abridging their speech, religion or the press but also have a enumerated right to regulate speech, the press or even create a State church via their State legislative process through the Tenth Amendment. As you will learn, the Fourteenth Amendment recognized and protected this very important concept by leaving reserved State rights undisturbed, and by further making no attempt to change the spirit of the Constitution itself.

Many confuse the words "life, liberty and property" spoken of in the Bill of Rights to mean expansive rights but this is incorrect for two very significant reasons. One is the simple fact life, liberty and property the Bill of Rights speaks of have to do with what a person stands to be deprived of for a violation of some law. In simple terms life meant the hanging

of someone for a crime while liberty signified throwing one in jail for a crime, and property meant the taking by government of fines, limbs or, even ones home.

In other words, when the Fourteenth Amendment speaks of life, liberty or property it is speaking of "*laws for the punishment of crimes against life, liberty, or property*" or the laws for the protection against crimes of life, liberty, or property. This is why we find the phrase "due process" associated with these words: all persons are entitled to a trial and other basic procedures of law before they can be deprived of their life, liberty and property by government action for a crime. It's these rights along with the right to be free from oppressive national government actions (example: a national church) we speak of in the Bill of Rights.

The other significant reason why the above is true is because the US Constitution was not vested with any concerns or direct authority over personal rights and matters of the people themselves (you will read more about this shortly.) The States and the people were given the sole jurisdiction of all matters dealing with peoples liberties and laws and not the national government. Madison's initial Bill of Rights was rejected when he attempted to make the same restrictions imposed upon Congress a restriction upon the States as well.

Likewise, the initial proposed Fourteenth Amendment was rejected because it was seen as giving the federal government direct jurisdiction over the affairs of citizens of the States, something the States have always tended to guard against -- even in the year 1866. It should also be noted that the right to vote was considered neither a liberty or a privileges or immunity under the first section of the Fourteenth Amendment, and thus, demonstrating further that life, libery or property was really simply what one stood to be deprive of for a violation of law. Sen. Jacob Howard who introduced the provisions of the Fourteenth Amendment to the Senate on May 23, 1866 said:

> [But] sir, the ***first section of the proposed amendment*** does not give to either of these classes the right of voting. The right of suffrage is not, in law, one of the privileges or immunities

> thus secured by the Constitution.

If liberty was seen as having expansive rights belonging to all citizens, then the right to vote could had easily been said to be found in the word "liberty."

Explaining the Fourteenth Amendment in such little space in a way that most can easily understand its purpose and limitations is challenging. I will make no attempt to filter the meaning of the Amendment through Supreme Court rulings -- but instead allow the primary framer's own words explain the meaning of the Amendment. After all, Supreme Court rulings can change over time but recorded history does not -- and no Supreme Court ruling can change recorded history.

It is my hope than, that this guide will enable the reader to to have a more honest understanding of what the Fourteenth Amendment is all about that can lead to better informed judgements from those who understood the meaning of the text best.

Perhaps once the great blindfold is removed from both ordinary citizens and State officials will they begin to see and appreciate the fact the Fourteenth Amendment sought no change in the relationship between the National Government, States, and most importantly, private citizens. On the other hand, many may find this new insight both troubling and disturbing because it will run against everything they been lead to believe in modern times. Like with all truths, its important that the truth be revealed so that better informed judgements can be made in the purest light.

The Fourteenth Amendment is Born

In February of 1866 John A. Bingham, a Republican representative from Ohio, proposed amending the Constitution of the United States with the following proposed amendment:

> The Congress shall have power to make laws which shall be necessary and proper to secure to

> the citizens of each State all the privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.

Initially this amendment ran into strong opposition from all sides of the aisle, leading to Sen. William Stewart of Nevada to argue the amendment would permit "Congress to legislate fully upon all subjects affecting life, liberty, and property," to such degree that "there would not be much left for the State Legislatures," and would thereby "work an entire change in our form of government."

Giles Hotchkiss of New York said "I understand the amendment as now proposed by its terms, to authorize Congress to establish uniform laws throughout the United States upon the subject named, the protection of life, liberty, and property. I am unwilling that Congress shall have any such power." Rep. Andrew Rogers of NJ blasted the proposed Amendment as "the embodiment of centralization and disfranchisement of the States of those sacred and immutable State rights" reserved in the organic law.

Rep. Garrett Davis was "especially opposed to any Amendment which may prove subversive of the principles on which the government was founded." Aaron Harding of KY argued: "Will not Congress then virtually hold all power of legislation over your own citizens and in defiance of you?"

Bingham's initial draft was made to lie on the table, which was a test vote on the merits and failed by a vote of 41 to 110. The bill went back to the Joint Committee on Reconstruction for further consideration and refinement by Bingham. On May 8, 1866 committee chairman, Thaddeus Stevens, introduced the new Amendment to the House as follows:

> This proposition is not all that the committee desired. It falls far short of my wishes, but it fulfills my hopes. I believe it is all that can be obtained in the present state of public opinion. Not only Congress but the several States are to be consulted. Upon a careful survey of the whole

> ground, we did not believe that nineteen of the loyal States could be induced to ratify any proposition more stringent than this.
>
> The first section prohibits the States from abridging the privileges and immunities of citizens of the United States, or unlawfully depriving them of life, liberty, or property, or of denying to any person within their jurisdiction the "equal" protection of the laws.
>
> I can hardly believe that any person can be found who will not admit that every one of these provisions is just. They are all asserted, in some form or other, in our Declaration or organic law. But the Constitution limits only the actions of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate equally upon all. Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford "equal" protection to the black man.

Here Stevens reveals behind the scenes struggles to produce the Amendment and the difficulties encountered in producing a version that the majority of States would be willing to ratify. Keep in mind that most of the States jealously guarded their sovereignty, and no doubt not many States would be found willing to arm Congress with the power to directly legislate over its citizens. The committee's final draft of the Amendment is what now found in the Constitution today:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

After the Amendment had come out of committee in March 1866, most began to feel encouraged that the Amendment proposed no threat or empowered Congress with any new powers over the States. New York Governor, Reuben E. Fenton, urged speedy ratification of the Amendment insisting that its provisions "are understood, appreciated and approved." Gov. Fenton being both a pro-abolitionists and staunch supporter of decentralized national government must had been assured that no new powers of Congress over the States was being advanced by the Amendment.

With most satisfied that the new proposed Fourteenth Amendment article proposed no threat to the States sovereignty it became ratified on July 28, 1868.

Citizenship Clause

> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.*

The Citizenship Clause did not originate from John Bingham but was inserted while the bill was under consideration in the Senate by Sen. Jacob Howard. It was intended to establish who is, and who isn't, a citizen of the United States. The clause itself is straightforward and came with ample documentary construction over how "subject to the jurisdiction" was to be construed. Sen. Howard introduced the clause this way:

> [T]his amendment which I have offered is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States. This

> will not, of course, include persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers accredited to the Government of the United States, but will include every other class of persons.

Of course the only other class of persons left that can be considered is US Citizens. Note that Sen. Howard considered it "the law of the land" already, confirming that it was already established national law that it was not enough to simply be born within the US to become a United States citizen. Sen. Howard later confirms just this when he said the Citizenship Clause "**ought to be construed so as to imply a full and complete jurisdiction on the part of the United States, whether exercised by Congress, by the executive, or by the judicial department; that is to say, the same jurisdiction in extent and quality as applies to every citizen of the United States now**."

Essentially then, the phrase "*subject to the jurisdiction*" was not used in any sense of geographical location -- but in the full sense of *allegiance*. This is confirmed by Sen. James Kelly a few years later when he said "***in order to be a citizen of the United States he must been not only be born within the United States, but born within the allegiance of the United States***."

One might wonder to why Sen. Jacob Howard choose to use the phrase "*subject to the jurisdiction thereof*" rather than the language of the civil rights bill of 1866 and 1870 that declared: "All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States"?

Answer: Howard feared that States could eventually impose a tax on Indians, making them eligible for citizenship under the Fourteenth. Because of the language "subject to the jurisdiction thereof" required direct allegiance to the United States, Indian's would be disqualified because they owed their allegiance to their respective tribes which in return were considered foreign nations.

It is also important to understand what the text of the clause

actually says: *subject to the jurisdiction of the United States* and not any particular State jurisdiction. This is why laws at the time were written to include both *limits* and *jurisdiction* of the United States when speaking of aliens. Take for example U.S. title XXX of 1875, sec 2165 where it states: ***"Any alien who was residing within the limits and under the jurisdiction of the United States..."***

It was never considered that a foreigner within the limits of a State was also automatically under the jurisdiction of the United States at the same time: they were considered still under the jurisdiction of their native country. Only time it could be said the United States had any jurisdiction over a alien is when the alien violates some U.S. law and the United States brings the alien under U.S. jurisdiction through a process of law.

Supreme Court rulings that followed after the adoption of the Fourteenth Amendment confirms the adopted understanding of the Citizenship Clause beginning with the Slaughterhouse Cases in 1873 where the court held that the Fourteenth Amendment excludes the children of aliens. Jumping to 1884, the court in Elk v. Wilkins 112 U.S. 94 (1884), held that the phrase "***subject to the jurisdiction***" requires "**direct and immediate allegiance**" to the United States, not just physical location. This is confirmed by the legislative history of the Fourteenth Amendment and the definition used by the Senate.

We will now focus on the rest of the first section of the Amendment.

Understanding Fourteenth Amendment Limitations

Understanding the limitations is important for one primary reason: Bingham was a lawyer who did not always choose his words clearly to describe what he was trying to say. Therefore, first step in understanding the Fourteenth Amendment is to first uncover the limitations that were clearly imposed by Bingham.

There can perhaps be no better starting point then in understanding the limitations of the Amendment than in comparing the difference between the initial proposed Amendment and that of the final accepted Amendment that came out of the committee months later. Recall Bingham's initial text draft:

> The Congress shall have power to make laws which shall be necessary and proper to secure to the citizens of each State all the privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.

During the debates of 1871 on enforcing the provisions of the Fourteenth Amendment, lead perhaps to the best summation of the differences between the rejected and later accepted Amendment between James Garfield and John Bingham. During open debate on the House floor over the significance between the two, and with Bingham attentively listening (and often interrupting to make clarifications), Garfield characterized Bingham's early rejected Amendment to having "***brought the power of Congress to bear directly upon the citizens, and contained a clear grant of power to legislate directly for the protection of life, liberty and property within the States.***"

That is, "**gave Congress plenary power to cover the whole subject with its jurisdiction.**" No one, including Bingham, objected to this characterization by Garfield.

Garfield then went on to characterize the accepted Amendment that stands in the Constitution today as simply a limitation "**imposed upon the States but did not oust the jurisdiction of the State over these subjects.**" That is, "***excerpts its force directly upon the States, laying restrictions and limitations upon their power and enabling Congress to enforce these limitations***." Again, no one including Bingham objected to this characterization of differences between the two Amendments.

Another significant limitation of the Amendment that aids in

properly understanding and interpreting it has to do with reserved State rights. What is a reserved state right the reader might wonder? A reserved State right is any right that is neither found in the US Constitution nor expressly prohibited to the States. For example, nothing in the Constitution prohibits local communities within the States from establishing relationships with churches or religion -- only Congress is directly prohibited from establishing anything religious through acts of legislation, and thus, Establishment is a reserved State right because the Constitution only expressly prohibited Congress and not the States.

Bingham knew from the initial resistance to his bill in February of 1866 that any attempt to trespass upon reserved State rights would lead to certain defeat of the Amendment both in Congress and with the State legislatures. Therefore, he had to make it clear throughout the debates (and years later) that the Amendment would not arm Congress with the power to usurp reserved State rights as evidenced by his own words:

- I repel the suggestion made here in the heat of debate, that the committee or any of its members who favor this proposition [Fourteenth Amendment] seek in any form to mar the Constitution of the country, or take away from any State any right that belongs to it, or from any citizen of any State any right that belongs to him under the Constitution.

- The adoption of this proposed [fourteenth] amendment will take from the States no rights that belong to the States.

- No right reserved by the Constitution to the States should be impaired, no right vested by it in Government of the United States, or in any Department or officer thereof, should be challenged or violated.

- I have always believed that the protection in time of peace within the States of all rights of person and citizen was of the powers reserved to the States. And so I still believe.

- Do gentlemen say that by so legislating [enforcing the Fourteenth Amendment] we would strike down the

rights of the State? God forbid.

- Allow me, Mr. Speaker, in passing, to say that this amendment takes from no State any right that ever pertained to it.

- It [Fourteenth Amendment] takes from no State any right which hitherto pertained to the several States of the Union...

Here Bingham repetitively makes clear the Fourteenth Fourteenth Amendment is not a grant of power upon Congress to strike down State rights -- and this is a very important limitation that allows States to enjoy the rights that had been retained by them and their citizens. For example, the States retained for themselves, in the words of Thomas Jefferson, "***the right of judging how far the licentiousness of speech, and of the press, may be abridged without lessening their useful freedom, and how far those abuses which cannot be separated from their use, should be tolerated rather than the use be destroyed.***"

And Jefferson further adds, "**they** [**States**] **guarded against all abridgment, by the United States, of the freedom of religious principles and exercises, and retained to themselves the right of protecting the same, as this, stated by a law passed on the general demand of its citizens, had already protected them from all human restraint or interference.**"

What Jefferson is talking about is the "*privileges or immunities*" of U.S. citizens in having the right to regulate religion, speech and the press. Congress cannot deny U.S. citizens guaranteed right to regulate religion, speech or the press through their own State government because such an act of denial is a violation all U.S. citizens "*privileges or immunities*" to do so through the Tenth Amendment. Bingham understood this better than anyone when he said the

Fourteenth Amendment would *not* take away from "***any citizen of any State any right that belongs to him under the Constitution***."

There would have to be a deliberate attempt by a State to enact and enforce a law to deny US citizens complete

freedom of speech that has no practical purpose other than to deny the freedom outright -- or a attempt to silence speech that targets only a specific class of US citizens based upon race. Non-citizens would have no constitutional right to bring about a complaint of speech abridgment since the privilege to do so is only given to US citizens under the Fourteenth.

Bingham had also said during the debates that he had entered "***upon no new construction,"*** *and "**I follow this day, in its letter and its spirit***" of the federal Constitution. So if we take Bingham's word at face value, it clearly means there is no attempt on his part to usurp the rights retained by the States and its citizens through the US Constitution. This would be further supported through Bingham's quoting of James Madison in saying, "***The powers reserved to the several States will extend to all objects, which concern the lives, liberties and properties of the people***."

It should be noted that when James Madison originally framed the Bill of Rights he intended for them to be a direct prohibition against the States just as with Congress. This of course was rejected, and thus, is the rights States retained for themselves that Jefferson speaks of.

How Bingham Defined Due Process, Equal Protection and More

It is a tremendous aid for anyone to understand and apply the Fourteenth Amendment when they have a solid understanding of how the words and phrases may have been understood and used by those who were involved in its legislative process and ratification. We'll start with a notorious phrase that has been badly distorted and abused: *Due Process of Law*.

During the debates, Rep. Andrew Rogers asked Bingham point blank: "what you mean by due process of law"? Bingham responded by saying, "I reply to the gentleman, the courts have settled that long ago, and the gentleman can go and read their decisions."

Well the Courts viewed due process up to the year 1866 as meaning only one thing: procedural rules laid down in "the Constitution itself." In other words, the deprivation of life, liberty, or property simply meant the punishment for crime through due process of law. The requirements of due process would be met by fair procedure, including notice to the defendant and an open trial with the right to counsel. This effectively limits due process only to court proceedings (both criminal and civil) since the only *procedures* laid down in the Bill of Rights pertaining to individuals is the procedure rights of the accused before the law.

Such unambiguous understanding of due process is further supported by Alexander Hamilton when he said: "The words 'due process' have a precise technical import, and are only applicable to the process and proceedings of the courts of justice; they can never be referred to an act of legislature."
It should also be pointed out that the Fourteenth's "due process" merely mimics the Fifth Amendment's due process and therefore the meaning of that clause in the Fifth controls the meaning in the Fourteenth.

Because Bingham left a record indicating the understanding of the meaning of the term "due process" at the time of framing, expansive interpretations are forbidden under the theory of "substantive due process." Bingham himself quoted Chief Justice John Marshall as affirming that any new expansive powers that are neither expressly granted, or enumerated in the Constitution, is forbidden: "The Constitution of the United States is one of limited and expressly delegated powers which can only be exercised as granted, or in cases enumerated."

James Garfield confirms all the above when he summarized the importance of the Fourteenth's due process clause:

> [***there] is no power in either the State or the national government to deprive any person of those great fundamental rights on which all true freedom rests, the rights of life, liberty and property, except by due process of law; that is, by an impartial trial according to the laws of the land***.

Perhaps the most important definition Bingham provided us with was when he equated "**equal protection of the laws**" to the words of the Magna Charta 46th clause: "*we will sell to no man, we will not deny or delay to any man right or justice.*" Essentially what the phrase meant to the Fourteenth Amendment's equal protection clause, according to Bingham, is that No State should "***deny to any such person any right secured to him by the laws and treaties of the United States or of such State***."

What this means is this: you cannot claim a equal protection violation for a right not secured to you. If a right is only secured to "citizens," than there can be no claim to equal protection of that right by non-citizens. Law's which secure all persons without some distinction, such as citizenship, is a equally protected law for all persons -- such as laws that might center on public safety, and certainly criminal justice because the States must observe the Bill of Rights when it comes to depriving persons of their life, liberty or property for a violation of law. Bingham confirms this is the proper construction for the equal protection clause when he said the following:

> [T]he gentleman inquires, what does this mean [equal protection of the laws]? It ought to have occurred to the gentleman that it means that no State shall deny to any person within its jurisdiction the equal protection of the Constitution of the United States, as that Constitution is the supreme law of the land, and, of course, that **no State should deny to any such person any of the rights which it guaranties to all men, nor should any State deny to any such person any right secured to him either by the laws and treaties of the United States or of such State**.

Here Bingham confirms the interpretation of equal protection of the laws. The rights which are guaranteed to all men are the procedures of law as found in the Bill of Rights guaranteeing fair treatment in a court of law before you can be deprived of life, liberty or property for a violation of law -- so a State cannot, say, deny a public trial to blacks because that would be a equal protection violation for the reason a trial is a

constitutional guarantee to all men. And of course Bingham confirms the State is only obligated to equal protection in regards to its own laws it actually secures to either all persons or specific groups of persons -- like lawful residents.

And then we have the most influential man in Congress at the time, Thaddeus Stevens, Chairman of the Committee on Reconstruction, describing the meaning of equal protection of the laws this way: "***Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford "equal" protection to the black man.***"

Simply stated, due process and equal protection of the laws is all about one thing and one thing only: Punishment of crimes against life, liberty or property or, the protection from crimes against life, liberty or property.

Bingham also had defined privileges and immunities as those rights belonging to US citizens as *expressly* enumerated in the first eight amendments of the Bill of Rights. He defined the word immunity as a citizens "exemption from unequal burdens."

Incorporation of The Bill of Rights: A Mess That Never Should Been

It is difficult nowadays to have any discussion of the Fourteenth Amendment and not enter into a discussion of the Theory of Incorporation. Probably the most misunderstood comment by John Bingham that has helped fuel the controversy came some four years after the Fourteenth Amendment had been adopted, when Bingham rhetorically uttered: "**These eight articles [Bill of Rights] I have shown never were limitations upon the power of the States, until made so by the Fourteenth Amendment.**"

But moments later Bingham then says, "***that no State shall abridge the privileges and immunities of citizens of the United States, which are defined in the eight articles of***

amendment, and which were not a limitations on the power of the States before the fourteenth amendment made them limitations."

And then a few moments later says: "***in this discussion I have been necessarily compelled to speak of the powers of the national government and of the powers of the States, and have referred only incidentally to the provisions of the Constitution guarantying rights, privileges, and immunities to citizens of the United States.***"

The only conclusion here that makes any sense and conforms with the actual text of the Amendment is that he is using the phrase Bill of Rights to broadly illustrate where the privileges or immunities of US citizens the Fourteenth speaks of can be found defined.

Unfortunately, court justices like Hugo Black, refused to give neither John Bingham nor the Fourteenth Amendment legislative history a fair reading by basing entire jurisprudence on selected quotes used out of context. To justice Black's credit, he did believe correctly that the privileges and immunities of U.S. citizens were, as John Bingham states, "chiefly defined in the first eight amendments to the Constitution of the United States." But erred in assuming Bingham meant for the Fourteenth Amendment to force the entire Bill of Rights against the States jot for jot.

Whenever Bingham spoke of the "Bill of Rights," he was not speaking of the entire provisions of the Bill of Rights to become a equal limitation upon the States as with Congress, but speaking of where the privileges or immunities of United States citizens could be found defined. It is much easier to just refer to the privileges or immunities as those found in the Bill of Rights rather than having to recite each pertaining one over and over again.

Consider also what Bingham said on March 9, 1866: "...**the enforcement of the bill of rights, touching the life, liberty, and property of every citizen**..." See there? While he speaks in general terms of enforcement of the Bill of Rights, he then qualifies this general statement to specifically mean only

those rights that belong to citizens (touching the life, liberty and property of every citizen), and not in the sense of the entire Bill of Rights jot for jot.

Bingham, being an accomplished lawyer, would never had written the Fourteenth Amendment the way he did if it was merely to force the entire Bill of Rights against each State. Why go through the trouble by repeating the 5th Amendment "due process" clause if the entire Bill of Rights were to be a limitation upon the States? What is the point in having two duplicate "due process" clauses?

Why would such a devoted Christian man, who after the adoption of the Amendment voted favorably for a bill to promote textbooks of Christian character in District of Columbia schools, or never to bring up a discussion of enforcing the "Establishment Clause" against the States during the entire legislative process? Furthermore, consider the text of the Fourteenth Amendment as it is found in the Constitution today -- speaks of privileges or immunities of US citizens, due process and equal protection -- not Bill of Rights.

The ability to make or establish laws respecting religion is not a privilege or immunity of a US citizen since US citizens do not legislate and pass laws individually -- only legislative govt. bodies whom are elected by US citizens collectively do. Because of this you cannot make the Establishment Clause a limitation upon the States through privileges or immunities because it is not a individual privilege belonging to a US Citizen, which explains why the subject never came up during the debates.

Chairman Thaddeus Stevens, when introducing Bingham's Amendment on May, 8, 1866, didn't consider the first section important at all, saying: "The second section I consider the most important in the article." Well now, if the first section of the Amendment somehow was intended to incorporate the Bill of Rights against the States ***WOULD*** had made the first section the most important section of the entire article (not to mention would had made for a real cat and dog fight to pass such a thing in both the House and Senate.)

Recall Bingham pronounced over and over that his

Amendment impairs no rights that belonged to the States; you cannot apply the entire Bill of Rights jot for jot against the States and not disturb some reserved State right. Not only has this left the theory of incorporation on life support for too many years -- but had been declared by Bingham himself to be dead on arrival.

The Fourteenth Amendment Enforcement Clause

We now come to the enforcement clause, which is Section 5 that reads: "***The Congress shall have power to enforce, by appropriate legislation, the provisions of this article***."

The discussion so far has paved the way for the reader to better understand how Bingham and the State legislatures who ratified the Amendment understood how enforcement was intended to be carried out by "appropriate legislation." We have learned through the text and its history that the Fourteenth Amendment directly "excerpts its force" upon the States with no power delegated to Congress to exert any power over the States. Instead, Congress was delegated only corrective powers.

When it comes to privileges or immunities, the restriction and enforcement is pretty self-evident and clear: Only when a law is enacted and enforced would it might trigger review under the Fourteenth Amendment. Because the Fourteenth Amendment was prohibited from interfering with reserved State rights, most controversies arising under the First Amendment is not enough to trigger Fourteenth Amendment review unless there is a clear attempt to outright deny speech or prohibit religious exercises, etc., through enacted State laws for this purpose. Recall the chairman of the Joint Committee on Reconstruction, which was responsible for the drafting and language of the Fourteenth Amendment, Thaddeus Stevens, said:

> [B]ut the Constitution limits only the actions of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of

> the States.

Bingham follows up two days later to confirm the same thing:

> [T]he great want of the citizens and stranger; protection by national law from unconstitutional State enactment's, is supplied by the first section of this amendment. That is the extent it hath, no more.

Here both Stevens and Bingham cut right to the chase and tells us in clear language what the understanding the Joint Committee had in regards to the scope of the Amendments enforcement: ***to correct unjust State enactment's!*** What is important to point out here is the purpose was to allow "*Congress to correct the unjust legislation of the States*," conforms gracefully and without conflict with the textual language of the Amendment that says "***no state shall make or enforce any law***."

The keywords here are "make" and "enforce" laws. In other words, if a State is not enforcing any laws that has been made, there can be no Fourteenth Amendment conflict when it comes to privileges or immunities. Next we come to the prohibition that reads:

> *...nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Here the keywords are "deprive" and "due process." Combined as they are they could only mean one thing at the time: the taking of life, liberty or property for violation of law. Recall our earlier discussion on "due process" when applied to a deprivation of either life, liberty, or property simply meant the procedures leading to punishment. The requirements of "due process" would be met by fair procedure, including notice to the defendant and an open trial before a jury of peers.

Recall also "equal protection of the laws" was understood to mean that no one was to be deprived of rights secured to

them under either laws, treaties or the Constitution. The only question that arises under this prohibition is whether a person is being deprived by State action of some right secured to them. An alien would not have an equal protection argument if they were denied say; a driver's license or a free education since these are generally privileges secured only to US citizens by the States.

With the above said, lets now turn to who is targeted for punishment for violations of the provisions of section 1. If you assume States get punished you would be in for a mild surprise. Consider the following statements by Bingham:

> Quote #1: [Y]ou have the express power to define the punishment of treason; the express power to punish the counterfeiting of coin or securities of the United States; the express power to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations; exclusive legislative power within the this District; express powers to govern all Territories; but where is the express power to define and punish crimes committed in any State by its ***official officers*** in violation of the rights of citizens and persons as declared in the Constitution? And from what expressly delegated power in the Constitution can any such power be implied?
>
> Quote #2: [P]assing the anti-slavery amendment, is there any one prepared to say that the bill of rights confers express legislative power on Congress to punish ***State officers*** for a willful and corrupt disregard of their oaths and oppressive and flagrantly unjust violations of the declared rights of every citizen and every free man in every free State?
>
> Quote #3: [q]uestion is, simply, whether you will give by this [fourteenth] amendment to the people of the United States, the power, by legislative enactment, to punish ***officials of States*** for violation of the oaths enjoined upon them? That is the question and the whole

question.

> Quote #4: [***S***]***tate legislature or State court, or State Executive***, has any right to deny protection to any free citizen of the United States within their limits in the rights of life, liberty and property.

It should be apparent that the Fourteenth Amendment targeted only State officers for enforcement and not private individuals. Consider also that Bingham believed that the "***United States punishes men, not States, for a violation of its law***." In addressing a civil rights bill at the same time of his proposed Fourteenth Amendment, Bingham had this to say:

> [You] propose to make it a penal offense for the judges of the States to obey the Constitution and laws of their States, and for their obedience thereto to punish them by fine and imprisonment as felons. I deny your power to do this. You cannot make and official act, done under color of law, and without criminal intent and from a sense of public duty, a crime.

In another statement highlighting the enforcement provisions of the Amendment, Bingham says:

> They [States] elect their legislatures; they enact their laws for the punishment of crimes against life, liberty, or property; but in the event of the adoption of this [fourteenth] amendment, if they conspire together to enact laws refusing equal protection to life, liberty, or property, the Congress is thereby vested with power to hold them to answer before the bar of the national courts for the violation of their oaths and of the rights of their fellow men.

Bingham spells out again the sole power sought for Congress was to hold State officers to the bar of the national courts for willful violation of their oaths against their fellow citizens -- not

private individuals. When he said, "conspire together," he was referring to southern States coming together to conspire against newly freed black slaves.

The court has attempted to circumvent the Fourteenth's limitations by holding the States responsible for private conduct in such areas as discrimination. This has been feeble at best because the Fourteenth Amendment language and legislative history extends no such powers, directly or indirectly over private conduct -- only does it with State enforcement of enacted laws or from the denial of a right secured to any person, such as a right to due process of law for the taking of their life, liberty or property for a violation of law.

The phrase "appropriate legislation" meant to simply declare through national laws that it was inappropriate for States to make and enforce laws that could lead to a denial of a guaranteed right or unequal protection of the laws by State officers in enforcing such laws. Let's take a look at how Congress enforced the provisions of Sec. 5 a few years later by the same people who were responsible for the Amendment's passage. Below is H.R. 320, a proposed 1871 bill to enforce the Fourteenth Amendment:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who, ***under color of any law***, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like

> cases in such courts, under the provisions of the act the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication," and the other remedial laws of the United States which are in their nature applicable in such cases.

Basically this reaffirms what should already be very apparent to the reader: The Fourteenth Amendment targeted State actors under the "*color of law*" while providing for remedy through federal courts to any unconstitutional denial by the enforcement of enacted laws. It is important to note that when addressing H.R. 320, Bingham made this comment:

> Mr. Speaker, this House may safely follow the example of the makers of the Constitution and the builders of the Republic, by passing laws for enforcing all the privileges and immunities of citizens of the United States, as guarantied by the amended Constitution and expressly enumerated in the Constitution.

Note the phrase "***expressly enumerated***" here; if the right is not "expressly enumerated," then it isn't a Fourteenth Amendment protected provision federal courts are allowed to review under Section 5. If courts were allowed a free-hand to find "new hidden" unremunerated rights than the entire concept of reserved State rights would be rendered meanness and open to judicial abuse -- perhaps leading to citizens being deprived of their sacred right to determine for themselves what new protected rights to accept.

What It Means

We can summarize the above as follows:

> 1) The Fourteenth Amendment did not empower Congress to invade reserved State rights or give Congress legislative power over private conduct within the States.

2) The Fourteenth Amendment targeted only State officers for possible punishment for unjust legislation and enforcement, not the State itself or private parties.

3) Enforcement of the Fourteenth Amendment was limited to providing remedy through federal courts to "**correct unjust legislation**" of the States.

4) States retained all rights as they had enjoyed before the adoption of the Fourteenth in defining and administering their laws, no matter how unjust as long as their laws were equally applied to all persons before a tribunal for either the protection or punishment of laws against life, liberty or property

5) The words of James Madison as quoted by Bingham that the "powers reserved to the several States will extend to all objects which concern the lives, liberties and properties of the people," was reaffirmed by Bingham.

6) Due process of law was inserted to highlight the principle that no life, liberty or property should be taken without process of law before a tribunal for any person.

7) Fourteenth Amendment provided neither direct or implied jurisdiction over State Establishment issues to federal courts.

Knowing what we know now about the Amendment, it is clear how the Fourteenth can be applied in every day life. The first question that should always be whenever a controversy arises under the provisions of the Fourteenth is whether the State is exercising a reserved State right? If the answer is yes, and there is no enforcement of some enacted law than that pretty much ends the discussion.

Next question should be: has there been a law made by a

State that when enforced denies someone some privilege, say, a right to speech? If there is a enacted law involved, the question than is whether the State is exercising a retained right to regulate, say speech or, is the law made to simply deprive a certain class of citizens some enumerated constitutional guarantee?

Remember that State rights were preserved by the Fourteenth Amendment. The Fourteenth Amendment does not require that State laws be fair or just, only that the laws secured to all persons be equally applied to "all persons" and that punishment or protection of life, liberty or property also must be equally applied to all persons.

Example: A law that says no persons can walk in the park after sundown must be enforced against all persons -- not selectively allowing say, persons with red hair, while enforcing the law against all other hair colors.

Additionally, a law that says only persons with red hair can be in the park after sundown can be enforced against anyone except redheads, and thus, can be enforced without running afoul with the equal protection clause. The reason should be obvious by now: you cannot complain of an unequal protection violation under Bingham's construction for something that has not either been secured to you or, has nothing to do with punishment or protection of life, liberty or property. If there is to be a challenge it would have to come under the States own Constitution or local laws because the Fourteenth concerns itself with either the "punishment of crimes against life, liberty, or property" or the protection against crimes of life, liberty, or property.

Furthermore, a State cannot make a law that leads to unequal punishment for the taking of life, liberty or property based upon hair color, skin color, gender, etc. Example: A State cannot make a death penalty for rape for black persons and only 10 years in jail for white persons. The procedures of law found in the Bill of Rights is considered a right belonging to all persons before they can be deprived of life, liberty or property, and therefore, must be equally applied to all.

Likewise, a State cannot enact a law that protects only

white persons against murder while ignoring blacks because the protection against crimes of life, liberty and property must be enforced "equally." People of a State are free to define what liberties they choose to grant for their fellow citizens or non-residents beyond the fundamental ones outlined in the Bill of Rights and made a limitation upon them by the Fourteenth -- could easily make it a "liberty" for anyone to be in any park after sundown, for example. This is bedrock Fourteenth Amendment principles.

Consider also that these basic principles is how visitors or tourists from other countries are protected by our laws once here against assault's on their life, the taken of their liberty (slavery) or the taking of their personal property -- but at the same time granting them no right under the Fourteenth to claim equal protection of the laws to obtain a drivers license, vote, right to own firearms, Medicare, etc.. Securing of all person's safety in regards to their life, liberty or property along with due process of the law for the punishment of violations of our laws made criminal is what is demanded under the Fourteenth Amendment's first section.

City ordinances generally do not fall under the Fourteenth Amendment for a number of important reasons -- mainly because these laws are not targeted towards individual criminal actions where individuals stand to be deprived of life, liberty or property made criminal -- but only targeted towards the safety, welfare or preservation of the community as a whole. You cannot argue you have a Fourteenth Amendment liberty to raise 100 hogs in your cul-de-sac front yard when the framers could not find the liberty to a right to vote and had to add a separate Amendment to secure this right.

I should also note that illegal alien apprehension has little Fourteenth Amendment considerations. This is true mainly because the objective of either local or federal government is the return of alien's to their country of origin or, failing that, return to the point were they had entered illegally. Generally speaking, local or federal government do not look to impose punishment against either the life, liberty or property of a alien, and the fact a alien has no secured right under the US Constitution to illegally remain in the country, the govt. can detain them till they can be removed and not run afoul

with either the due process or equal protection clauses.

On the other hand, if the government attempts to imprison, fine a alien for being in the country illegally, that is, impose criminal sanctions against a alien, then the alien would have to be afforded due process before punishment for the crime of illegal entry is imposed.

Most all cases that could trigger Fourteenth Amendment considerations will mostly deal with defendants before a court of law since most of the privileges or immunities deals with process of law before someone can be deprived of life, liberty, or property. Due process describes such a procedure as we have learned. So here, the really *big* question that will likely always be raised is whether the person has been accused of violating some criminal law and stands to be deprived of life, liberty or property without due process of law?

A presumed right to abortion won't make the burden under the Fourteenth primarily because it is neither an protected enumerated guarantee nor is it something that stands to be lost as punishment for a crime. Since the Supreme Court has no enumerated right under the Constitution to create new constitutional rights -- the right to abortion falls squarely under State jurisdiction and its citizens.

Furthermore, if someone claims they are being deprived of of equal protection of the laws, the question than what is right that has been secured to them by State law, treaty or the US Constitution is being denied to them? Since the US Constitution was not intended to be the peoples source for everyday individual rights and liberties, we must than focus on local law. If it can be determined that a person is being deprived of some right/law of the State that is intended for the protection of life, liberty or property does the issue come under the light of the Fourteenth Amendment.

The sole purpose of the first section of the Fourteenth Amendment was to protect people against unconstitutional State enactment's while also leaving the States their retained rights under their constitutional compact. Because of this, a law or act that merely appears to run afoul with the First Amendment is not enough. There would have to be a clear

attempt of outright denial targeted to a specific class of citizens through legislative enactment and enforcement because other wise a State is merely exercising a protected reserved right.

And finally, the reader might wonder what about current federal laws? Congress isn't exactly known to be a body of law when it comes to exercising its limited constitutional grants of powers with little oversight from the US Supreme Court. Consider the following opinion delivered by justice Kennedy in City of Boerne v. P.F. Flores, Archbishop of San Antonio (521 U.S. 507 (1997)):

> Under our Constitution, the Federal Government is one of enumerated powers. The judicial authority to determine the constitutionality of laws, in cases and controversies, is based on the premise that the "powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." Marbury v. Madison, 5 U.S. 137 (1803).

Unfortunately, the court like with Congress, only adheres to these supreme principles when they find it convenient. Until the day comes when we have sitting Supreme Court justices who will be willing to seriously reconsider years of unconstitutional power expansion -- a expansion with a $8 trillion (and growing) federal deficit to show for constitutional abandonment -- can both Congress and the court begin to say "*we are a nation of law*" with a straight face.